

BRADLEY PADGETT)	
Claimant)	
VS.)	
)	
STOOGES RESTAURANT & BAR)	Docket No. 242,689
Respondent)	
AND)	
)	
KANSAS RESTAURANT ASSOCIATION)	
SELF INSURANCE FUND)	
Insurance Carrier)	

Claimant appeals from a preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes on July 26, 1999.

The Administrative Law Judge denied benefits based upon a finding that claimant failed to prove that he suffered accidental injury arising out of and in the course of his employment. Claimant appeals that finding. Whether claimant gave timely notice was also an issue at the preliminary hearing.

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order should be affirmed.

Claimant began performing bartender and other miscellaneous duties for respondent beginning in May 1998. Claimant had undergone back surgery on two occasions before working for respondent. He had back surgery performed by Dr. Bernard Poole in 1992 and had back surgery performed by Dr. Amrani in 1997. Claimant was on light duty restrictions from Dr. Amrani for the first month of his employment with respondent. He began full duties in June 1998 and testified his back began getting worse in June 1998. According to claimant, his back continued to get worse until he left work on March 6, 1999.

Claimant went on his own to Dr. Terry L. Poling, his family physician. He first saw Dr. Poling on June 6, 1999. By answering written questions, Dr. Poling has provided his opinion that claimant has been temporarily totally disabled since March 6, 1999, as a result of a condition aggravated by his work.

Under the circumstances presented in this case, it appears possible that claimant was simply unable to tolerate the work activities as a result of his previous injury rather than having

suffered a new injury working for respondent. But the claimant's testimony, together with the opinion of Dr. Poling, indicates claimant has, as a result of the work he did for respondent, at least temporarily worsened his condition. The Board finds claimant did suffer accidental injury arising out of and in the course of employment.

But the Board concludes claimant did not give notice within ten days as required by K.S.A. 44-520. It is clear that claimant advised his employer his back was hurting. The dispute concerns whether he advised them it was work related. Respondent knew about claimant's earlier back surgery. Mr. Larry L. Rebarchek, one of the owners, testified that they started claimant on light duty because of claimant's back surgery. He also acknowledged claimant complained about his back. He even watched claimant at work to assure he did not lift over the 40-pound limit. Claimant approached respondent about getting health insurance so he could see a physician for his back.

Mr. Rebarchek testified claimant did not advise him the back problems were related to his work for respondent. Mr. Rebarchek and his partner went to claimant's home after claimant stopped coming to work. Claimant told them of another injury, one to his wrist at home. But claimant did not, according to Mr. Rebarchek, ever ask him to authorize a physician or tell him the back problem was related to the work for respondent. Claimant last worked for respondent on March 6, 1999, and on March 19, 1999, claimant submitted a written note to respondent regarding the "progressive condition of my lower back." This note does not relate the problem to his work for respondent. It can easily be understood as a complaint that respondent had failed to provide him with health insurance.

Notice is given if the claimant provides information from which one would reasonably conclude he/she has suffered injury caused, aggravated, or accelerated by the work. Although the evidence presents a quite close question on this issue, the Board finds claimant did not give notice. The question of just cause for extending the time for notice is not addressed in the evidence and is not considered by the Board in this appeal.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes on July 26, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

c: David H. Farris, Wichita, KS
Jeffery R. Brewer, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director